Supreme Court of the United States

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OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, ET AL.,
Defendants.

Brief of Defendant William S. Ely.

SAMUEL R. STERN and
WILLIAM E. CULLEN,
(Spokane, Wash.),
Of Counsel.

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Brief of Defendant William S. Ely.

Owing to a misconception of the time vouchsafed us for filing a brief herein in behalf of defendant, William S. Ely, we are unduly hurried in the preparation of this one in order to comply with the rules of this Court as to the time for filing

same, and must therefore apologize for its form and substance and for referring to the brief interposed herein by Messrs. Post and Preston in behalf of other defendants similarly affected.

We desire in behalf of this defendant, William S. Ely, to invoke all the points, and the authorities so well urged in behalf of the defendants Brown, et al., supplementing our suggestions with a few facts and reasons why, in the case of the defendant Ely, the judgment should be affirmed.

I.

The jurisdiction of this Court cannot be invoked by the appellants.

Smith v. Wingard, 3 Wash. Ter. Rep., 398.
De Saussure v. Gaillard, 127 U. S., 216.
Seeberger v. McCormick, 175 U. S., 128.

An inspection of the opinion of the Supreme Court of Washington in the case at bar makes it manifest that the state court was also of the opinion that no appeal would lie from its decision to the Supreme Court of the United States, and we desire to call the Court's attention to the language to be found at page 130 of the Record and in part included in the excerpt quoted in the brief of Messrs. Post and Preston, to which there might well be added the following:

"But it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way according to

its own declaration it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made."

The Court then proceeded to demonstrate that the case of *The Northern Pacific Railway Co. v. Smith,* 171 U. S., 260, was not necessarily decisive of the question involved in the case at bar.

The statements contained in earlier portions of the opinion (trans. p. 129) again indicate the three questions raised in the State Supreme Court; and the appellant seemed perfectly content to rest the decision upon the question of adverse possession under the state statutes, and but for the case of *Northern Pacific Railroad Co. v. Townsend,* 23 *supra,* Ct. Rep., 671, would probably have pursued the case at bar no further.

II.

ON THE MERITS.

The title of the defendant Ely should be adjudged superior to that of the appellant.

It is our purpose to show that there are points of difference between the case at bar and the Townsend and Smith cases, and that upon the merits of this particular case this defendant should prevail.

In the Smith case the Court said, that apart from the effect of the judgment of *res adjudicata,* it was quite apparent

that Smith was thereby visited with notice of the claim of the railroad company; and again it was stated—

> "That the property holder, if cognizant of the facts, may, by permitting a railroad company without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action in ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

In the pending case just the reverse of these facts are disclosed. The appellant rather than the respondent is precluded by the known facts to say nothing of its course of conduct. There was no prior adjudication from which notice could have been attributed to defendant Ely.

In the Smith case Mr. Justice White at the outset of the opinion states that the grant of the right of way, filing of map of definite location and the construction of the railroad preceded the filing of the homestead entries. Just the reverse is to be found in the present case as to all the defendants who derived title through persons whose patents and plats were filed prior to the taking of any steps on the part of the railroad company.

What are the facts found as to the defendant Ely? Prior to 1886 S. G. Havermale and wife were the owners and had the fee simple title to a large tract of land including lot one

(1), block three (3), now belonging to the defendant Ely, this particular lot facing on three streets according to a recorded plat of Havermale's Addition. The plat of this addition had been of record to the knowledge of appellant here since Oct. 1, 1879, and no objections of any kind had ever been made by the appellant or its predecessors, not alone to the filing of said plat, but to the use and occupancy of said lot and the streets upon which the same faced, Riverside avenue being the principal business street of Spokane, Sprague avenue, the next street in point of importance, and Division street, also one of the main arteries of that city. Sidewalks were laid, sewers built, streets paved and continuously used during all of these years by the public because of the dedication of the same as streets. That no portion of this lot was used for railroad purposes. That the property was deeded from time to time, the various grantees paying for the property in good faith and the title being passed by the leading lawyers of the city of Spokane, and ultimately vesting in Alice Houghton, who, in turn, gave to the defendant, Ely, a mortgage which said Ely was compelled to foreclose. That he bid in the property under the judgment obtained in said foreclosure proceedings, said judgment amounting to $8687.50, exclusive of costs and attorney's fees. (See Trans., pp. 92-4.)

It further appeared that the defendant Ely had expended large sums of money in payment of taxes and assessments and in the improvement of the property, all without notice of any adverse claims on the part of the appellant, and that

he and his predecessors had continued in open and notorious possession and occupancy for upwards of ten years.

The issues as made up by the plaintiff (appellant) and the defendant Ely were tried before the Court without a jury, and the Court refused to make the findings of fact and conclusions of law requested by the appellant, but found for the defendant as to the foregoing facts. (See Trans., pp. 89-91.)

By the bill of exceptions it is further shown that proof was made of all the matters hereinbefore referred to and particularly that valuable improvements had been made upon said property by the defendant Ely, buildings being erected, and fences and sidewalks built about the same, that the street known as Division street and the avenues known as Riverside and Sprague avenues for upwards of ten years have been open to the public as the main thoroughfares of the city without objection on the part of the appellant; that for upwards of fifteen years prior to the purchase of said property by defendant Ely, S. G. Havermale received a patent from the United States and platted the land owned by him into Havermale's Addition.

It further appears (page 115 of the Transcript) that testimony was offered to show that in consideration of certain services performed by Alice Houghton, the owner of the property at the time the mortgage was made to defendant Ely, that the appellant had agreed to give a quitclaim deed of any part of the so-called right of way included within the limits of said property owned by her, and thus expressly dis-

claim ownership thereof; that the services were performed, but that the railroad company neither paid for the same nor gave said quit claim deed.

The evidence further disclosed the following chronological facts:

Plat Havermale Addition, filed October 1, 1879.

Patent from Government, June 9, 1883.

Havermale deeded Lot 1, Block 3, to Landis, December 31, 1885.

Landis deeded to Kearney, October 25, 1886.

Kearney deeded to Dwyer, November 10, 1888.

Dwyer deeded to Williams and Houghton, June 7, 1889.

Williams deeded to Houghton, June 13, 1891.

Houghton mortgaged to Ely, April 9, 1892.

Ely takes title under foreclosure, June 5, 1894.

It is thus made to appear that, unlike the Smith and Townsend cases, Havermale did not have notice of the railroad purposes to which this right of way was to be devoted, but, on the contrary, that the railroad company, when said plat was filed and patent issued, had not made use of this property in any manner whatsoever.

In the Townsend case, particularly, it appeared that the settlers saw the railroad in operation, knew that the right of way was being used for railroad purposes and were put upon inquiry, at least as to the extent of the grant to the railroad company and that it might possibly use the land in question

for railroad purposes. But in the case at bar, there was ample evidence to show that an abandonment of that portion of the right of way was contemplated, and, in fact, went into effect.

It would scarcely seem possible to more absolutely abandon a right of way and to give notice that no part of it would be used, than to permit, as this appellant did permit, the erection of expensive buildings, the making of permanent improvements, the use of a portion of the right of way for the principal streets of the city and the enclosing of the same with fences and the use of the same for sidewalks and sewers, without a word of protest, without a suggestion of ownership, without anything in fact to indicate that it required any portion of this property for its use as a right of way or in the operation of its railroad, and surely it ought to be the best judge as to what portion of the property it might wish to use and what portion it might wish to abandon, especially when it conveys the property.

Looking for a moment at the purposes of this grant, should it not be said that the same were amply fulfilled by the use made of such portions of the grant as the appellant actually used or gave notice that it would use, or might require in the operation of its road?

Undoubtedly Congress had in mind the opening up to settlers of a vast section of the country and the reasonable use and occupation of a strip of land sufficient for the purpose of operating and properly maintaining the artery which it was proposed to create.

It is not claimed by the appellant that the portion of the right of way used by it has not been and will not be sufficient for such purpose, while on the contrary its very abandonment of a portion of the same, being portions subsequently conveyed to various purchasers, would indicate that it had conceded its right to alienate the property thus conveyed, and that it made no claim as against Mrs. Houghton, who in turn was permitted to deal with this property free from any claims of any kind on the part of the railroad company.

If, under the circumstances above disclosed, this Court should fail to hold that the appellant can be estopped by its conduct under circumstances that certainly would deprive an individual of his rights, and under statutes well known to it, the hardship which will ensue is simply immeasurable. It is not a question of restoring unoccupied lands or farm lands or property of little value, but in this particular litigation, titles that have been settled for years, improvements running into millions of dollars, and the use of streets, sidewalks in a thickly populated city, are so much involved that the attention of this Court is particularly challenged and the rights of these defendants especially a subject of consideration.

We desire particularly in conclusion to quote the language of the Washington Court:

> "One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the

statute of limitations, and this is true even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute if such possession is not disturbed within the time prescribed. As is said by *Washburn on Real Property*, Fourth Edition, Vol. 3, page 164, the operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held, that the effect of the statute was merely to take away the remedy, and did not bind the estate or transfer the title."

In a case, therefore, where the full purpose of a grant has been subserved, where a line of railroad has been built, where no claim is made by such railroad that it requires land adversely held for upwards of ten years for the purpose of conducting and operating its railroad, where it has paid no taxes upon the portion of the right of way alienated, where it has allowed a city to take possession of its right of way for streets and other municipal improvements, where it has permitted expensive permanent improvements to be made, and rents to be collected, and contractual obligations of many kinds to obtain, and all in a populous part of a growing city, and all without let, hindrance, protest or objection of any kind, the courts ought not to nullify all these acts, nor uphold

a litigant in an action to quiet title under such circumstances.

The judgment should be affirmed as to the defendant Ely.

Respectfully submitted,

SAMUEL R. STERN and
WILLIAM E. CULLEN,
Of Counsel for Defendant William S. Ely.